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In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-666

JOHN LESLIE PHILLIPS, JR.; and CAROLYN L. PHILLIPS; WALTER LARKIN; BOBBY L. McQUIDDY; CHARLES RICHARD ALLEN; JOHN THOMAS SWINGER; and LAR CHESTER WARD,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT AT CINCINNATI

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In the Supreme Court of the United States

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT AT CINCINNATI

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

PETITIONERS PRAY THAT A WRIT OF CERTIORARI ISSUE TO REVIEW THE JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT ENTERED IN THIS CASE ON AUGUST 26, 1973.

CITATION TO OPINIONS BELOW

Order of the Court of Appeals unreported filed August 26, 1973. (App. A3)

JURISDICTION

The Court of Appeals entered judgment on August 26, 1973 with time for filing this petition extending to October 19, 1973.

The jurisdiction of this Court is invoked under 28 U.S.C. §1254 (1).

QUESTION PRESENTED

Whether the federal regulation of criminal activities under 21 U.S.C. §841 (a) (1) is a constitutionally permissible exercise of congressional authority pursuant to the commerce power, where such regulation is based merely upon a finding that the class of activities to be regulated has an effect upon interstate commerce, with no requirement of demonstrating any specific connection between the particular prohibited conduct and interstate commerce.

STATUTES RELIED UPON

The Congress makes the following findings and declarations:

(1) Many of the drugs included within this subchapter have a useful and legitimate medical purpose and are necessary to maintain the health and general welfare of the American people.

(2) The illegal importation, manufacture, distribution, and possession and improper use of controlled substances have a substantial and detrimental effect on the health and general welfare of the American people.

(3) A major portion of the traffic in controlled substances flows through interstate and foreign commerce. Incidents of the traffic which are not an integral part of the interstate or foreign flow, such as

manufacture, local distribution, and possession, nonetheless have a substantial and direct effect upon interstate commerce because—

(A) after manufacture, many controlled substances are transported in interstate commerce,

(B) controlled substances distributed locally usually have been transported in interstate commerce immediately before their distribution, and

(C) controlled substances possessed commonly flow through interstate commerce immediately prior to such possession.

(4) Local distribution and possession of controlled substances contribute to swelling the interstate traffic in such substances.

(5) Controlled substances manufactured and distributed intrastate cannot be differentiated from controlled substances manufactured and distributed interstate. Thus, it is not feasible to distinguish, in terms of controls, between controlled substances manufactured and distributed interstate and controlled substances manufactured and distributed intrastate.

(6) Federal control of the intrastate incidents of the traffic in controlled substances is essential to the effective control of the interstate incidents of such traffic.

(7) The United States is a party to the Single Convention on Narcotic Drugs, 1961, and other international conventions designed to establish effective control over international and domestic traffic in controlled substances.

Pub.L. 91-513, Title II, §101, Oct. 27, 1970, 84 Stat. 1242.

§ 841. Prohibited acts A—Unlawful acts

(a) Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally—

(1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance; or

(2) to create, distribute, or dispense, or possess with intent to distribute or dispense, a counterfeit substance.

Penalties

(b) Except as otherwise provided in section 845 of this title, any person who violates subsection (a) of this section shall be sentenced as follows:

(1) (A) In the case of a controlled substance in schedule I or II which is a narcotic drug, such person shall be sentenced to a term of imprisonment of not more than 15 years, a fine of not more than $25,000, or both. If any person commits such a violation after one or more prior convictions of him for an offense punishable under this paragraph, or for a felony under any other provision of this subchapter or subchapter II of this chapter or other law of the United States relating to narcotic drugs, marihuana, or depressant or stimulant substances, have become final, such person shall be sentenced to a term of imprisonment of not more than 30 years, a fine of not more than $50,000, or both. Any sentence imposing a term of imprisonment under this paragraph shall, in the absence of such a prior conviction, impose a special parole term of at least 3 years in addition to such term of imprisonment and shall, if there was

such a prior conviction, impose a special parole term of at least 6 years in addition to such term of imprisonment.

REASONS FOR GRANTING THE WRIT OF CERTIORARI

I. Petitioners respectfully contend the Writ should be granted as it presents issues important to the criminal processes not yet passed upon by the Court, but which will continue to be raised in other cases, concerning the permissible scope and extent of Congressional utilization of the commerce power as the basis for the federal regulation of local criminal activities.

II. The petitioners have not received needed and proper relief by the Courts below.

STATEMENT OF CASE AND FACTS

June 14, 1972 date of indictment.

(1) Allen:

On Wednesday, March 21, 1973, Charles Richard Allen was found guilty on two counts of violating 21 U.S.C. 841 (a) (1) and sentenced to prison for a period of three years on each of the two counts of the indictment, the sentences to run concurrently with each other. In addition there was imposed a mandatory probation term of three years.

At the trial without a jury, evidence was presented to the effect that the defendant had sold heroin hydrochloride to a Bureau of Narcotics & Dangerous Drugs agent on two occasions.

There is no proof in the record that there was any interstate commerce involvement.

(2) Walter Larkin:

On Tuesday, March 20, 1973, Walter Larkin was tried and found guilty on one count of violating 21 U.S.C. 841 (a) (1) and sentenced to three years' imprisonment and three years' probation. The trial was without jury.

The evidence presented against the defendant was essentially that he had sold heroin hydrochloride to a B.N.D.D. undercover agent on April 19, 1972. The transaction for which the defendant was prosecuted took place near Fourteenth and Jefferson Streets in Nashville, Tennessee. The sale was made to an agent of the Bureau of Narcotics and Dangerous Drugs. There was no evidence presented at trial establishing a nexus with interstate commerce resulting from the illegal sale of heroin.

(3) McQuiddy:

On March 22, 1973, Bobby L. McQuiddy was convicted of violating 21 U.S.C. 841 (a) (1) and sentenced to imprisonment for six years on each indictment, the two sentences to run concurrently. The trial was had without a jury. In addition, the defendant was put on probation for three years following the completion of his imprisonment.

The evidence against the defendant consisted primarily of testimony by a B.N.D.D. undercover police agent that he had purchased heroin from the defendant twice on April 21, 1972. There was no evidence presented showing a nexus between the sale of the heroin and interstate commerce. The two transactions took place in Nashville, Tennessee.

Defense counsel moved for dismissal of the case on the ground that there was no proof in the record of any interstate commerce involvement. The Court denied the motion.

(4) Phillips, John L. and Phillips, Carolyn:

On March 21, 1973, John L. Phillips and Carolyn L. Phillips, after a trial without a jury, were convicted of two (2) violations of Title 21, United States Code, Section 841 (a) (1) and *Title 18, United States Code, Section 2,* that is, unlawful possession and distribution of heroin.

John L. Phillips was sentenced to eight (8) years imprisonment on each count, sentences to run concurrently, with a three (3) year mandatory probation following the sentence. Carolyn L. Phillips was sentenced to serve three (3) years on Counts I and II, to run concurrently, with a three (3) year mandatory probation to follow.

The evidence against the defendants essentially was that Special Agent Tyrone Yarn on March 23, 1972, paid $150 to John Phillips and received a quantity of heroin from Carolyn Phillips. On March 30, 1972 a similar transaction occurred with Mr. Phillips receiving $150 in cash and Mrs. Phillips making the transfer.

No evidence appears in the record which would show any connection between the sales and interstate commerce. Local police officers were involved at all stages of the investigation and participated in setting up the purchases. Both sales took place in Nashville, Tennessee in a small, locally owned grocery store. Defense counsel moved for dismissal of the case since no involvement with interstate commerce had been shown. The Court denied the motion.

(6) John Swinger:

John Swinger, appellant, was convicted of two (2) violations of Title 21, United States Code, Section 841 (a) (1), possession and distribution of heroin.

Appellant is appealing from the judgment of the District Court entered on March 22, 1973, sentencing him

to three (3) years imprisonment on each count, the sentences to run concurrently, with a three (3) year mandatory probation.

The evidence against the defendant was, essentially, that on June 9, 1972, that Swinger sold two packages of heroin to Special Agent Yarn of the B.N.D.D. at a Nashville garage. Also, on June 15, 1972, the same agent made a second purchase at the same location from defendant Swinger.

There was no evidence introduced at the trial which would show any connection or effect on interstate commerce resulting from the defendant's sale of drugs. Counsel for the defendant moved for dismissal on the ground of no showing of interstate commerce involvement. The motion was overruled by the Court.

(7) Lar Chester Ward:

Lar Chester Ward, appellant, was convicted of two (2) violations of Title 21, United States Code, Section 841 (a) (1), unlawful distribution and possession of a controlled substance. Ward was sentenced to one (1) year in confinement on Count I with a mandatory three (3) year probation to follow the sentence, and a one (1) year suspended sentence with a five (5) year probation to follow the sentence in Count I.

The evidence against the defendant was, essentially, that he sold a quantity of heroin to Special Agent Yarn of the B.N.D.D. on March 23, 1972 near a liquor store in Nashville. Also, on March 29, 1972, a similar transaction occurred between Agent Yarn and the defendant.

Defense counsel moved for dismissal of the indictment for the reason that there was not shown any interstate commerce involvement. The Court denied the motion.

Timely objection was made to statute, by way of a Motion to Dismiss which was overruled. (App. A1)

Appeal was perfected to the United States Court of Appeals for the Sixth Circuit. A short order affirming the judgment of the District Court was returned; the Court did not discuss the issues raised at any length. (App. A3-A4)

Petitioners are now properly before this Court by the Petition.

ARGUMENT

I.

Congress exceeded its constitutional grant of authority under the commerce clause in enacting 21 U.S.C. §841 (a)(1) by not requiring that some specific connection be demonstrated between the particular prohibited conduct and interstate commerce, and therefore, 21 U.S.C. §841 (a)(1) is unconstitutional.

A. In federal legislation enacted pursuant to the Commerce Clause, there is a distinction between the constitutionally permissible federal regulation of economic activities and the constitutionally permissible federal regulation of criminal activities, in that only in the former can such regulation be based merely upon a finding that the class of activities to be regulated has an effect upon interstate commerce.

Petitioners were indicted and convicted under 21 U.S.C. §841 (a) (1), a section of the Comprehensive Drug Abuse Prevention and Control Act of 1970. It is clear from the Congressional Findings and Declarations of 21 U.S.C. §801 that Congress based this federal regulation of criminal activities on the commerce power. However, the statute does not require as the linchpin for the invocation of federal jurisdiction that the prosecution show as an element of the statutory offense some nexus between the particular prohibited conduct and interstate commerce.

The petitioners contend that by not requiring in the federal criminal statute in question that some specific connection be shown between the prohibited conduct and interstate commerce, Congress has attempted to use the commerce power as a basis for federal criminal sanctions on

purely local activity and thereby has exceeded its constitutional grant of authority under the Commerce Clause, and therefore, 21 U.S.C. §841 (a) (1) is unconstitutional.

In support of this contention petitioners submit that, in federal legislation enacted pursuant to the commerce power, there is a distinction between the federal regulation of economic activities and the federal regulation of criminal activities. While in the regulation of economic activities, Congress may properly regulate a *class* of activities without proof that the particular intrastate activity in question had an effect on commerce, see *United States* v. *Darby*, 312 U.S. 100, 61 S.Ct. 451 (1941); in enacting criminal legislation pursuant to the commerce power Congress has traditionally included the statutory requirement that a connection between the proscribed intrastate activity and interstate commerce be specifically alleged and proved. *See United States* v. *Perez*, 426 F.2d 1073 (2nd Cir. 1970) (dissenting opinion), *aff'd* 402 U.S. 146 (1970); Comment, 9 Hous. L. Rev. 160 (1971).

Federal regulation under the commerce power reaches three basic areas. First, Congress may control the channels of interstate commerce. Second, Congress may legislate to protect the instrumentalities of interstate commerce. Third, the power extends to purely intrastate activities which *affect* commerce. *Perez* v. *United States*, 402 U.S. 146, 91 S.Ct. 1357 (1970).

It is with regulation of activities deemed to "affect commerce" that we are concerned, and it is this category of regulation that has been utilized for the broad extension of federal control and regulation over what appears to be essentially local activities.

Chief Justice Marshall first expounded upon the broad grant of power given Congress under the Commerce Clause in *Gibbons* v. *Ogden*, 22 U.S. (9 Wheat) 1 (1824). In

laying down the initial test regarding the extent of federal authority over intrastate or local activities, Marshall stated that Congress could constitutionally legislate regarding—

> "those internal concerns which affect the states generally; but not to those which are completely within a particular state, which do not affect other states, and with which it is not necessary to interfere, for the purpose of executing some of the general powers of the [federal] government." 22 U.S. (9 Wheat) at 195.

No subsequent significant delineation of the scope of federal power under the Commerce Clause took place until the post-Depression New Deal Era. Much of the New Deal legislation, in attempting to restore stability to the nation's economy, operated to expand the degree and extent of federal control and regulation over what had traditionally been conceived of as State or Local economic activity.

In considering whether such federal regulation could constitutionally be based on the Commerce Clause, the Supreme Court in the case of *N.L.R.B.* v. *Jones and Laughlin Steel Corporation,* 301 U.S. 1, 57 S.Ct. 615 (1937) announced a new constitutional standard which substantially expanded the scope of federal power over local activities, holding that as long as intrastate activities

> "have such a close and substantial relation to interstate commerce that their control is essential or appropriate to protect that commerce from burdens and obstructions, Congress cannot be denied the power to exercise the control." 301 U.S. at 37.

The next major development in the federal regulation of economic activities came in *United States* v. *Darby,* 312 U.S. 100, 61 S.Ct. 451 (1941), the decision sustaining an Act of Congress which prohibited the employment

of workers in the production of goods "for interstate commerce" at other than proscribed wages and hours.

In *Darby,* the Supreme Court recognized the power of Congress to consider activities as an entire class when measuring their impact on commerce, holding that a *class* of activities may be properly regulated by Congress without proof that the particular intrastate activity against which a sanction was laid had an effect on commerce. 312 U.S. at 120-121.

In *Heart of Atlanta Motel, Inc.* v. *United States,* 379 U.S. 241, 85 S.Ct. 348 (1964), the Court articulated its most recent test for determining the outer constitutional limits of the commerce clause power, holding that the only questions for the Court in reviewing the exercise of Congressional power are: (1) whether Congress had a rational basis for finding that the regulated activity affected commerce, and (2) whether the means chosen to attain the end were reasonable and appropriate. 379 U.S. at 258.

It is extremely important to note that these decisions expanding the scope of federal power under the Commerce Clause, and particularly the *Darby* case allowing activities to be considered as a *class,* all involved federal regulation of *economic* activities.

B. In order for federal legislation enacted for the purpose of the regulation of criminal activities to be a permissible exercise of Congressional authority pursuant to the commerce power, Congress must require that some specific connection be shown between the particular prohibited conduct and interstate commerce.

In contrast to the statutes and decisions involving federal regulation of economic activities, where Congress has sought to rely on the Commerce Clause as the power

basis for the federal regulation of criminal activities, it has generally demanded as an element of the crime that some nexus be shown between the particular conduct prohibited and interstate commerce. *See The Scope of Federal Criminal Jurisdiction Under the Commerce Clause,* 1972 U. Ill. L.F. 805; Comment, 9 Hous. L. Rev. 160 (1971).

The underlying rationale for this requirement is the concept of *federalism.*

> "Congress has consistently been hesitant about defining as a federal crime conduct which is already denounced as criminal by the States, and has done so only when for some exceptional reason the machinery of State law enforcement needed to be supplemented and re-enforced by federal action. This policy, inexact though it is, is obviously rooted deeply and soundly in the theory and practice of American federalism." H. Hart and A. Sacks, *The Legal Process: Basic Problems In The Making and Application of Law,* 1241 (tent. ed. 1958).

The first significant federal criminal legislation based on the commerce power was enacted in the 1930's largely in an effort to reach the activities of organized crime. *See* Chamberlain, *Federal Criminal Statutes,* 20 A.B.A.J. 501 (1934). These statutes had the common characteristic of invoking federal jurisdiction only on the showing of some nexus between interstate commerce and the conduct prohibited. *See* Lindbergh Kidnapping Act, ch. 271, 475 Stat. 326 (1932), *as amended* 18 U.S.C. §§10, 1201-02 (1970); Act of May 18, 1934, ch. 300, 48 Stat. 781, *as amended* 18 U.S.C. §§875, 3239 (1970); Anti-Racketeering Act of June 18, 1934, ch. 569, §§1-6, 48 Stat. 979, *as amended* 18 U.S.C. §1951 (1970).

The next major volume of federal criminal legislation came in the 1960's. In the early 1960's Attorney

General Robert Kennedy recommended eight bills to Congress, all of which were subsequently enacted. *See generally* Kennedy, *The Program of the Department of Justice on Organized Crime,* 38 Notre Dame Law, 637 (1963). Under each of these bills, federal regulation was permitted only upon some showing of a nexus between the prohibited conduct and interstate commece. *See e.g.* Travel Act, 18 U.S.C. §1952 (1970); Act of September 13, 1961, 18 U.S.C. §§1302, 1953 (1970); Act of September 13, 1961, 18 U.S.C. §§1081, 1084 (1970); Fugitive Felon Act, 18 U.S.C. §1073 (1970).

The key significance here is that this federal legislation, although enacted 20 years after the Court in *Darby* held that a class of activities could be regulated by Congress without any need to show some nexus between interstate commerce and the specific act in question, still clearly required that in order to validly exercise federal power in regulating criminal activities such a specific nexus must be shown. This distinction recognized by the Attorney General and Congress is the same distinction urged here by the petitioners: that there is a fundamental difference between the permissible utilization of the commerce power for the purpose of regulating economic activities and the utilization of such power for the regulation of criminal activities, in that in the latter regulation of a *class* of activities without the showing of a nexus in each case, is an impermissible expansion of federal power.

In addition to the recognition of this basic distinction by the legislature, the Courts have also noted the difference. In *United States* v. *Five Gambling Devices,* 346 U.S. 441, 74 S.Ct. 190 (1953), the Court affirmed the dismissal of indictments against the defendants under a statute requiring registration of gambling devices and prohibiting their interstate movement. The Court held that the

registration and monthly reporting requirements of the act did not apply to purely intrastate dealers and intrastate sales of gambling devices, indicating the need for proof of a specific connection between the activity and interstate commerce. 346 U.S. at 452.

In *Stirone* v. *United States,* 361 U.S. 212, 80 S.Ct. 270 (1960), the Court, in interpreting the Hobbs Act, 18 U.S.C. §1951, held that there were two elements to the crime of extortion, interference with commerce and extortion.

> "Both these elements have to be charged. Neither is surplusage and neither can be treated as surplusage. The charge that interstate commerce is affected is critical since the Federal Government's jurisdiction of this crime rests only on that interference."

Also, in *Rewis* v. *United States,* 401 U.S. 808, 91 S.Ct. 1056 (1971), the Court reversed the conviction of petitioners in holding that conducting a gambling operation frequented by out-of-state betters does not, without more, constitute a violation of the Travel Act, 18 U.S.C. §1952. The Court indicated that the failure of the government to tie the alleged criminal acts of the defendants to interstate commerce was of key significance.

> "The jury was not charged that it must find that petitioners actively sought interstate patronage. And we are not informed of any action by petitioners . . . that was designed to attract out of state customers." 401 U.S. at 814.

The Court declined to accept an expansive interpretation of the Travel Act, since to do so "would alter sensitive federal-state relationships [and] could overextend limited federal police resources." Id. at 812.

However, in enacting the federal anti-loansharking statute in 1968, 18 U.S.C. §§891-96, the Congress deviated from the traditionally accepted approach to federal regulation of criminal activities. This Act does not require as an element of the crime that some special connection between loansharking and interstate commerce be shown. As a result, the Supreme Court in *Perez* v. *United States*, 402 U.S. 146, 91 S.Ct. 1357 (1970) was asked to determine the scope and constitutionality of the Act. The Court upheld the Act under the "class of activities" test, saying that where Congress has the power to regulate a class of activities because that class affects interstate commerce, it is not necessary to show a particular interstate connection in each case. 402 U.S. at 153-155.

Mr. Justice Stewart dissented in *Perez* on the grounds that a person could be convicted under the statute without any showing that his conduct affected interstate commerce, and in his opinion

> ". . . the Framers of the Constitution never intended that the National Government might define as a crime and prosecute such wholly local activity through the enactment of federal criminal laws." 402 U.S. at 157.

Justice Stewart went on to say that since the "definition and prosecution of local, interstate crime are reserved to the States under the Ninth and Tenth Amendments", this statute was beyond the power of Congress to enact, since it was not possible "to discern any rational distinction between loansharking and other local crime." 402 U.S. at 158.

The majority opinion did not confront the economic-criminal dichotomy directly, or deal with previous decisions reflecting the distinction in the two types of federal regulation and the need for a specific connection in criminal

cases. One reason for this may be that although loansharking is a criminal offense, extortionate credit transactions have substantial economic ramifications and impact, so that the Court may have been viewing this legislation, at least partially, as primarily the regulation of *economic* activities. The Court refers to the "economic, financial and social setting of the problem", and describes loansharking as the "way organized crime . . . siphons funds from numerous localities to finance its national operations." 402 U.S. at 156-157.

The Court appeared to return to the traditional path in its decision in *United States* v. *Bass*, 404 U.S. 336, 92 S. Ct. 515 (1971). In *Bass*, the Court held that Title VII of the Omnibus Crime Control and Safe Streets Act must be read to require a nexus with interstate commerce be shown with respect to the offense embraced by the provision. 404 U.S. at 347. The Court based this reading on the view that "Congress has traditionally been reluctant to define as a federal crime conduct readily denounced as criminal by the States," and that a broader reading urged by the Government "renders traditional local criminal conduct a matter of federal enforcement and would also invoke a substantial extension of federal police resources." 404 U.S. 349-50.

The Court concluded that absent proof of some interstate commerce connection in each case, the statute "dramatically intrudes upon traditional state criminal jurisdiction." 404 U.S. at 350. Finally, the Court ended the opinion by indicating such a nexus was an appropriate aspect of any federal criminal legislation:

> "And consistent with our regard for the sensitive relation between federal and state criminal jurisdiction, our reading preserves as an element of all the offenses a requirement suited to federal criminal jurisdiction alone." 404 U.S. at 351.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

DALE QUILLEN
Attorney for Petitioners

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing Petition for Writ of Certiorari has been mailed to the Solicitor General of the United States, Department of Justice, Washington, D.C. 20530, this 16th day of October, 1973.

DALE QUILLEN
Attorney for Petitioners

APPENDIX

UNITED STATES OF AMERICA
vs.
CHARLES RICHARD ALLEN

UNITED STATES OF AMERICA
vs.
WALTER LARKIN

UNITED STATES OF AMERICA
vs.
BOBBY L. McQUIDDY

UNITED STATES OF AMERICA
vs.
JOHN LESLIE PHILLIPS, JR.
and CAROLYN L. PHILLIPS

UNITED STATES OF AMERICA
vs.
JAMES ROGERS

UNITED STATES OF AMERICA
vs.
LAR CHESTER WARD

MOTION TO DISMISS

Come the defendants and respectfully move the Court to dismiss the above styled indictments pending against them and for cause, say:

1. That the indictments are a result of selective law enforcement, the selection arising out of racial prejudice

in violation of the due process rights of the defendants contained in the Fifth Amendment to the United States Constitution.

2. That the indictment charges a crime in violation of the Tenth Amendment to the Constitution of the United States, in that the Federal Government is attempting to exercise control over activities which are local in nature and only remotely and theoretically effective upon interstate commerce. Further, that the premise upon which Title 21, Section 801, U.S.C.A., and subsequent sections rely is without legal basis in fact and substance.

WHEREFORE, defendants respectfully contend that the above styled indictments should be dismissed.

UNITED STATES OF AMERICA
vs.
JOHN LESLIE PHILLIPS, JR.

UNITED STATES OF AMERICA
vs.
CAROLYN L. PHILLIPS

UNITED STATES OF AMERICA
vs.
WALTER LARKIN

UNITED STATES OF AMERICA
vs.
BOBBY L. McQUIDDY

UNITED STATES OF AMERICA
vs.
CHARLES RICHARD ALLEN

UNITED STATES OF AMERICA
vs.
JOHN THOMAS SWINGER

UNITED STATES OF AMERICA
vs.
LAR CHESTER WARD

ORDER

BEFORE: WEICK, EDWARDS and LIVELY, Circuit Judges.

The Court has previously granted a motion by the defendants that these six cases be consolidated in this Court. The United States of America has filed a motion

in each case to affirm under Rule 8 of the Rules of the Sixth Circuit. In response to the motions to affirm, the attorney who represents all six appellants stated that two issues were raised on appeal: (1) that the prosecution failed to prove a direct connection with interstate commerce in prosecution for distribution of a controlled substance in violation of 21 U.S.C. §841 and (2) that the prosecution was based upon an unjustifiable standard of discrimination contrary to the due process clause of the Fifth Amendment of the United States Constitution and that such selective prosecution deserves further briefing and argument. Subsequently, a combined brief was filed on behalf of all six defendants-appellants and the only issues raised in the brief relate to the failure to prove a nexus with interstate commerce. The brief contains no statement or argument with respect to selective prosecution. The matter has been referred to this panel pursuant to Rule 3(e), Rules of the Sixth Circuit.

In *United States* v. *Scales*, 464 F.2d 371 (6th Cir. 1972) this Court disposed of the arguments made herein with respect to interstate commerce and held that no direct connection with interstate commerce is required for prosecution under 21 U.S.C. §841. We adhere to the holding in *United States* v. *Scales*, and since no other issue has been presented on appeal it is manifest that the questions on which the decision of this case depends are so unsubstantial as not to need further argument. Rule 8, Rules of the Sixth Circuit.

Wherefore, it is ORDERED that the motion of the plaintiff-appellee to affirm the judgment of the District Court be, and it hereby is, granted.

LIBRARY
SUPREME COURT, U. S.

FILE
JAN 18
MICHAEL RODAK, JR.

No. 73-666

In the Supreme Court of the United States

OCTOBER TERM, 1973

JOHN LESLIE PHILLIPS, JR.,
ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1973

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v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioners contend that the Comprehensive Drug Abuse Prevention and Control Act of 1970 goes beyond the power of Congress under the commerce clause, since it proscribes dealing in narcotics whether or not an interstate nexus has been shown in a particular case.

After jury-waived trials in the United States District Court for the Middle District of Tennessee, petitioners were convicted of having distributed heroin and possessed heroin with intent to distribute, in violation of 21 U.S.C. 841(a)(1).[1] Petitioner Larkin was convicted on one count and was sentenced to three years'

[1] Petitioners John Leslie Phillips, Jr. and Carolyn L. Phillips were tried jointly. The other petitioners were tried separately.

imprisonment and three years' probation. The other petitioners were each convicted on two counts. Petitioner John Phillips received concurrent sentences of eight years' imprisonment, to be followed by three years' probation. Petitioners Carolyn Phillips, Allen, and Swinger received concurrent sentences of three years' imprisonment and three years' probation. Petitioner McQuiddy received concurrent sentences of six years' imprisonment and three years' probation. Petitioner Ward received a sentence of one year's imprisonment and three years' probation on count 1 and a suspended one-year sentence and five years' probation on count 2. On petitioners' motion, the cases were consolidated on appeal. The court of appeals affirmed (Pet. App.).

The undisputed evidence showed that petitioners sold heroin to government undercover agents in Nashville, Tennessee. Petitioners' sole contention is that the Comprehensive Drug Abuse Prevention and Control Act of 1970, under which they were convicted, is an unconstitutional exercise of Congressional authority because it does not require proof of a nexus with interstate commerce as a condition for conviction. However, all courts of appeals which have considered the question have upheld the statute as a valid exercise of congressional power under the commerce clause. See, *e.g., United States* v. *Lopez,* 459 F. 2d 949 (C.A. 5), certiorari denied *sub nom. Llerena* v. *United States,* 409 U.S. 878; *United States* v. *Rodriguez-Camacho,* 468 F. 2d 1220 (C.A. 9), certiorari denied, 410 U.S. 985. In *Perez* v. *United States,* 402 U.S. 146, this Court reaffirmed prior rulings that the commerce clause can reach wholly intrastate activities where, as a class, those activities have a substantial effect upon interstate commerce. This is so whether or not such a

connection can be shown in any individual situation. There can be little doubt that the Drug Abuse Act deals with matters having a profound effect on interstate commerce. This determination by Congress, reached after extensive examination into the vice of narcotics trafficking, is stated in explicit legislative findings. See 21 U.S.C. 801 (Pet. 2-3). In light of the rational basis for these congressional findings, the Comprehensive Drug Abuse Prevention and Control Act is constitutional.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

JANUARY 1974.